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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 433 F.2d 212 and is set forth as Appendix A to the Petition (Pet. A 1a-60a). The opinions of the District Court are unreported and appear in Appendix B (Pet. B 61a-68a; 69a-73a). The report and order of the Interstate Commerce Commission are reported at 325 I.C.C. 106 and appear as Appendix C (Pet. C 74a-100a).

Jurisdiction

Jurisdictional requisites are adequately recited in the Petition.

Question Presented

An Interstate Commerce Commission order directing motor carriers to cancel increased rate schedules was placed under a court restraining order that was afterward dissolved as improvidently issued. Whereupon the carriers moved to dismiss their own complaint without prejudice and that motion was granted. The question presented is the same as that defined by the Court of Appeals (Pet. 7a):

> "The question presently on this appeal is a relatively narrow one, namely whether the shippers are entitled to restitution from the carriers for the rates which were charged during the existence of the temporary restraining order, which rates were higher than those which could have been charged had the cancellation order gone into effect at the original compliance date of September 13."

However, petitioners' statement of the question (Pet. 2) embraces the proposition that restitution is dependent on two conditions precedent: (1) in addition to the court's determination that the restraint was improvidently issued, despite dismissal of the complaint on the carriers' own motion, there must be a court adjudication that the restrained Commission order was valid; and, (2) to the Commission adjudication in its investigation proceeding that the increases were not shown just and reasonable, there must be coupled a second adjudication by the Commission in a reparation action brought by the shippers that the increases were unjust and unreasonable.

Statutes Involved

Relevant provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in Appendix D of the Petition (Pet. D 101a-110a). Relevant, but not included in the Petition, are the following provisions of the Judiciary and Judicial Procedure Act:

SEC. 2284(3)—28 U.S.C. § 2284(3).

THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

[(1) and (2) not relevant]

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

SEC. 2324—28 U.S.C. § 2324.

STAY OF COMMISSION'S ORDER

The pendency of an action to enjoin, set aside, or suspend any order of the Interstate Commerce Commis-

sion shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

Statement

Respondents are 15 shipper organizations and 2 state public service commissions,* all parties to the Commission proceeding which eventuated in the order directing cancellation of rate increases as not shown just and reasonable. They intervened in the District Court in defense of the Commission's order and counterclaimed for restitution on behalf of shippers and receivers of freight. When the District Court dismissed the proceeding as moot, discharged the injunction bond and dismissed the counterclaim, respondents appealed, first to this Court (which dismissed for lack of jurisdiction), then to the Court of Appeals whose judgment directing restitution the petitioners now seek to review by writ of certiorari.

In the opinion rendered by the Court of Appeals (by Gibson, Circuit Judge), the factual situation involved in this case is described with great clarity. The attention of

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* The respondents are: National Small Shipments Traffic Conference, Inc.; Drug and Toilet Preparation Traffic Conference; Nebraska State Railway Commission; North Dakota Public Service Commission; Aberdeen Chamber of Commerce; Iowa Industrial Traffic League; Chamber of Commerce of Fargo; Chamber of Commerce of Grand Forks; Lincoln Chamber of Commerce; Minneapolis Traffic Association; Omaha Chamber of Commerce; St. Joseph Chamber of Commerce; Traffic Bureau of Sioux Falls; Waterloo-Cedar Falls Traffic Association; Western South Dakota Traffic Bureau; Diana Manufacturing Company; Wisconsin Manufacturers' Association.

this Court is respectfully directed thereto (Pet. A 4a-7a) as a concise and revealing statement of the case. Certain facts and events assume importance in light of contentions put forth in the petition for certiorari. They merit special comment.

1. The Commission's report articulates, as the basis for its order directing cancellation of the increases, that evidence tendered by the carriers was "found to be of little probative value" and could not "support a finding that the imposition of the proposed increases on this traffic results in rates which do not exceed reasonable maxima." It also found anomalous situations in rates higher for short than long hauls and said responsible carriers "must remove them unless they rebut the presumption of unreasonableness" (Pet. C 94a-95a). Thus, the Commission concluded, the carriers failed to discharge their statutory burden of proving the rates just and reasonable and they were ordered cancelled.

2. The Commission order of cancellation of February 24, 1965, as is usual in an investigation of this sort, simply directed cancellation of the increases for failure of the carriers to discharge their burden of proof. Upon compliance with this order, the carriers were free to publish, on 30 days' notice, any rates they felt they could justify. The compliance date fixed by the order of cancellation was April 14, 1965. In the period between February 24th and April 14th the carriers did nothing by way of republishing new rates but petitioned for reconsideration and other relief. On July 23, 1965, the Commission issued its order denying the carrier petitions and fixing September 13, 1965, as the ultimate compliance date. Again the carriers did

nothing by way of republication until September 5, 1965, and at that date they filed a surcharge increase to take effect on 30 days' notice *i.e.* October 5, 1965. On September 9, 1965, the carriers filed their court suit and obtained a restraint on the Commission's order. When that was dissolved on September 29th, their surcharge increase schedules could have become effective only six days later. But they voluntarily postponed the October 5th effective date to November 16, 1965, fearing suspension. These events are revealing of the administrative remedies that were available—but unused—by the carriers. They are discussed by the Court of Appeals as significant of carrier manipulation of their rate prerogatives (Pet. A 42; 19a) and the reason for its conclusion that "in the absence of any carrier action to establish new rates where a tariff is found unlawful, the last lawful preexisting rates are the effective rates to be applied by a court in considering restitution" (Pet. A 19a). Those prior rates would have become effective but for the wrongful restraint on the Commission's order and they provide the precise measure of shipper damage occasioned by the restraint (Pet. A 20a).

3. The November 16th increase was not a republication of the increase that was ordered cancelled. It was termed "a temporary revenue measure" and, unlike the 5% *less-truckload* increase, was applicable to *all* shipments (Affidavit, J. D. Lawson, in support of motion to dismiss complaint, p. 6). These schedules were permitted to become effective. Petitioners state "Presumably the Commission was satisfied with the carriers' demonstration of revenue need . . ." (Pet. 6). This is contra-indicated by the fact that the Commission ordered investigation. The order stated "there is reason to institute an investigation to

determine whether [the per-shipment charges] are unjust and unreasonable . . .". The November 16th increase was never approved by the Commission. As noted in the opinion below (Pet. A 6a), when the surcharge increase was converted to hundred-weight rates, the new schedules were ordered suspended; substitute tariffs were filed and these were ordered suspended; upon cancellation by the carriers of the suspended matter, the Commission discontinued its investigation, nearly two years after the November 16th increases were allowed to take effect.

4. Dissolution by the three-judge court of the temporary restraining order was accompanied by findings and conclusions significant of the nature of "improvidence" in this case: [plaintiff carriers] "have adequate administrative remedies which will enable them to proceed with proposed new increased rates *already filed* with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates." [Emphasis added.]

5. On dissolution of the restraining order and effectuation of the November 16th increases, the carriers concluded that they had no further use for the court suit (Lawson Affidavit, p. 11: "Plaintiffs have no further interest in the validity or the invalidity of the Commission's order in Docket M-17450"). On September 28, 1966, they presented a motion to the District Court to strike the counterclaim and discharge the injunction bond, arguing that the case was now moot. The motion was denied by the District Court which held the counterclaim to be proper since "the facts are uncontroverted that the alleged injury suffered by the intervenors [the shippers] occurred as a direct result of the process of this Court which the plaintiff sought and obtained."

6. On September 25, 1967 the shipper parties moved to bring the case on for hearing on the merits. The carriers again took the position that the suit was moot; on October 2, 1967, they moved to dismiss their complaint without prejudice; to discharge the injunction bond; to dismiss the counterclaim. Their motion papers are extraordinarily revealing of an unequivocal position that the case was moot and a single-minded purpose to dismiss their own complaint. *No alternative relief was asked.* A copy of the motion to dismiss is annexed as Appendix A to this brief. After hearing held on July 9, 1968, the court on September 5, 1968 issued its judgment. It declined the shippers' request for a determination on the merits, granted the carriers' motion to dismiss the complaint without prejudice, dismissed the counterclaim, and discharged the injunction bond (Pet. B 61a-68a). On motion for amended findings of fact and conclusions of law, the three-judge court on April 9, 1969 issued a new memorandum opinion with revised findings but the same judgment (Pet. C 69a-73a). At no time did the petitioners recede from the position that they had mooted the case and that they were entitled to dismissal of their complaint without prejudice. In their brief (as respondents) to the Court of Appeals they said (p. 2):

> "Upon dissolution of a temporary restraining order issued at the request of the carriers and denial of their motion for a temporary injunction to permit hearing on the merits of their complaint, the carriers successfully moved to dismiss their complaint . . ."

They added a significant statement (p. 3):

> "The propriety of the dismissal of the complaint by the three-judge court below, convoked by authority of

> 28 U.S.C. 2321, et seq. to review the Commission order, is not here at issue, and that question is not presented by the respective Statements of Issue in either No. 19863 or No. 19870."

Following the judgment of the Court of Appeals reversing the district court and directing restitution, the carriers filed a petition for rehearing. Nowhere in that 25-page document did they ask for modification of the court's judgment with respect to dismissal of their complaint nor did they seek leave to file a motion for hearing on the merits of the complaint to obtain a determination as to the validity of the Commission's order. Instead they maintained (pp. 17-18):

> "There was, therefore, no subject matter upon which a review and remand could operate. The order of the Commission had been executed. The rate and tariff changes had been effectuated and the economic situation had been altered beyond recall. Literally, nothing was left for review . . . In these circumstances how can it be said that a moot decision and order of the Interstate Commerce Commission can be reviewed when absolutely no relief can be afforded the petitioning party—even if successful . . . Having found the appeal and review of the Commission order to be moot, all that remained was for the district court to declare it so and to vacate the order of the Commission on those grounds."

Today—in a petition for certiorari—the carriers invert the position steadfastly maintained below. They call for an adjudication of the merits of the complaint (Pet. 15).

Argument

As noted by the Court of Appeals, the issue in this case is relatively narrow, the doctrine of restitution deeply rooted in equity, the cases uniform in holding regulated carriers and utilities answerable to restitutional claimants (Pet. A 7a; 23a; 25a-29a). The facts of this case involve an injunctive restraint that was unquestionably wrongful, being both unnecessary and unjustified. It was unnecessary since administrative alternatives were undeniably at the carriers' disposal; it was unjustified since the complaint was shown to be of dubious virtue. In dissolving the restraining order, the three-judge court articulated both these reasons (Pet. A 5a). Soon thereafter the carriers saw no profit in their suit and moved its dismissal. Injury to the carriers' clients was directly attributable to restraint of the Commission's order since only the restraint prevented its enforcement on September 13th, the prescribed compliance date when rates at a reduced level would have had to become effective. The rates paid by the shippers on and after September 13th, laid against the rates they would have paid but for the injunctive restraint, measure the damage to shippers and the restitutional recovery that is their due.

On these facts the decision of the Court of Appeals is manifestly correct. There is no conflict of authorities, real or even asserted. The "special and important reasons" for review that petitioners see are but wishful. To make this a case of first impression is to turn one's back on *Ex Parte Lincoln Gas & Electric Co.*, 256 U.S. 512, allowing restitution against regulated utilities; on *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, treating

with state-regulated carriers; *Bell* v. *United States,* 49 F. Supp. 505, dealing with carriers regulated under the Interstate Commerce Act; and, cases in every walk of commerce that are annotated to follow the lead of the cited authorities (*Restitution as Remedy for Wrongful Injunction,* 131 A.L.R. 878; *Interlocutory Injunctions and the Injunction Bond,* 73 Harv. L. Rev., 333). Specifically responsive to petitioners' assertion (Pet. 8) that they know of no federal court that has held that courts have power to make restitution of freight charges collected under applicable tariffs, independently of action by the Interstate Commerce Commission, is *Accelerated Transport-Pony Express Inc.* v. *United States,* 227 F. Supp. 815 (D.C. Vt. 1964), Aff'd 379 U.S. 4 (1964). The case is fully discussed by the Court of Appeals (Pet. A 28a-29a) which rejected in toto the carriers' attempt to deprecate the relevance of the decision. The court said (29a):

> "*Accelerated Transport* is clearly entitled to precedential value on this issue."

The petition raises no significant question relating to the well-established doctrine of restitution. No important question of federal law, not already adequately dealt with, requires deliberation by this Court. In their argument to the Court of Appeals, petitioners stated flatly (Brief, p. 20): "The Interstate Commerce Act precludes restitution." This remarkable dictum was rejected by the Court of Appeals as impossible to reconcile with the regulatory purpose of the Interstate Commerce Act or with equity's historic role to do equity (Pet. A 44a; 53a-55a). For that matter, *Inland Steel Co.* v. *United States,* 306 U.S. 153,

and *Bell* v. *United States, supra,* belie the manifesto that would abrogate the remedy with respect to carriers regulated under the Act. In their petition for certiorari, the statement of preclusion is gone. But its continuing effect is advocated by an argument that would introduce two preconditions to restitutional recovery: (1) a court adjudication in the injunction suit that the Commission order was valid; (2) a Commission adjudication in a separately to-be-instituted reparation suit that the rates are unlawful as unjust and unreasonable. No case has enunciated either proposition; the leading cases contradict both.

1. In *Arkadelphia Milling,* leading exponent of the restitutional remedy, there was no final adjudication of validity of the carriers' attack on the Commission-initiated rates; the judgment of remand directed dismissal of the railroad complaint without prejudice. *Allen* v. *St. Louis I. M. & S. Ry.,* 230 U.S. 553 at 560. The same was true in *Ex Parte Lincoln Gas.* The suit that challenged the rate ordinance was dismissed *without prejudice* (256 U.S. 512 at 515). Yet, a petition to the court for mandamus to nullify provisions made for restitution was denied on authority of *Arkadelphia Milling,* the court saying (at 517): "To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate." In *Bell* v. *United States,* the Commission order that was under review was actually reversed by the Commission itself. Yet, the court awarded restitution for improvident restraint of the first order.

That an adjudication on the merits of the complaint is often encountered in restitution cases is far from a determination that it is condition precedent to restitutional re-

covery. The underlying basis for the remedy of restitution is improvidence in issuance of the injunctive restraint. Improvidence may reside in matters other than the validity of the order sustained. This was noted by the court below (Pet., 53a, ftnote 4). See also *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 52 (1938).

The statute that creates the procedure for review of a Commission order establishes the conditions for grant of a temporary restraint. Filing suit does not itself operate as a stay (28 U.S.C. § 2324). The district judge *may* grant a temporary restraining order but only to prevent irreparable damage and the order must contain "a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted" (28 U.S.C. § 2284 (3)). A restraint was issued here on allegations of irreparable harm submitted by the carriers. Of inescapable significance is the explicit finding of the three-judge court made at the time it dissolved the restraining order and denied interlocutory injunction that the carriers had adequate administrative remedies available; increase tariffs were already on file with the Commission. Indeed, the increase tariffs were on file with the Commission when the restraining order was sought and obtained (Lawson Affidavit appended to carriers' motion to dismiss the complaint). In short, there was no threat of irreparable injury here. Any damage from effectuation of the Commission's order was not irreparable. As stated in *Virginia Petroleum Jobbers* v. *Federal P. C.*, 259 F.2d 921 (1958):

> "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of time

and energy necessarily expended in the absence of a stay, are not enough . . ."

As the court below recognized (Pet. A 47a-48a; 17a-20a; 53a-55a), improvidence here in issuing the temporary restraint was in no way related to validity or invalidity of the Commission's order of cancellation and the remedy of restitution cannot be said to be dependent upon an adjudication of the merits of the complaint. Nor are petitioners aided in their contention that an adjudication on the merits is indispensable, by the contrary position they strongly advocated below. Their motion to dismiss without prejudice was unaccompanied by an alternative prayer for adjudication on the merits (Appendix A, this brief). They urged "the legality or illegality of the Commission order in Docket M-17459 is now academic. Judicial review of that order will accomplish nothing" (affidavit annexed to motion papers, p. 12). And again, "nothing can now be gained by a review of the Commission action . . . the issues herein are moot—these proceedings should be discontinued" (affidavit, p. 13). The case is clearly within the rule enunciated in *Arkadelphia* and *Ex Parte Lincoln Gas,* as fully discussed in the opinion of the court. (Pet. A 21a-26a).

2. To contend, as do petitioners, that an award of restitution may not be had without a Commission determination that the rates at issue were unjust and unreasonable when paid—that is, that a reparation suit must be prosecuted by the shippers before they can be made whole for wrongful restraint of the Commission's order—is to defeat the remedy of restitution. This was certainly true as to motor carriers regulated under Part II of the Act prior to Sep-

tember 5, 1965, when the statute lacked a reparation provision. Under the doctrine of *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), the Commission was powerless either to make a reparation award or to make an administrative determination that rates were unjust and unreasonable in the past. Under petitioners' theory, restitution would indeed have been precluded under the Interstate Commerce Act, at least with respect to motor carriers. What would have been true as a matter of law prior to 1965 would be true as a matter of empirical fact today. The motor carrier part of the Interstate Commerce Act includes a reparation provision (49 U.S.C. § 304a). Unlike § 16 of the railroad part which provides for a reparation complaint to be filed directly with the Commission, § 304a introduces a complex procedure that necessitates the institution of a suit in court first, followed by either a reference to the Commission or the filing of a Commission complaint. Needless to say, only reparation complaints of substantial monetary dimensions can survive a litigation prospect such as this. The Commission's effort to introduce an expeditious and economical procedure for small shipment claims was thwarted by motor carrier objections in a court suit and in the end given up by the Commission. *National Motor Freight Traffic Association* v. *United States*, 268 F. Supp. 90 (1967); *Informal Procedure, Motor Carrier Reparation*, 335 I.C.C. 403 (1969). The practical impediments to a reparation suit were noted by the court below (Pet. A 42a):

> "It is reasonably certain that many members of the general shipping public, who ultimately bore the burden of the higher rates in force by virtue of the temporary restraining order, will be unable for practical reasons to recover these charges."

See also *Ex Parte Lincoln Gas,* 256 U.S. 512 at 517. But the harm done the regulatory purpose would far exceed the monetary cost to shippers, deterred from undertaking reparation proceedings in order to enforce restitutional recovery. This goes to the core of the regulatory process in its interaction with judicial review. It is articulated by Professor Jaffe* as concern that appeals to the courts to review agency action "are not to become attractive as mechanisms to gain time." He adds: "although the bond and ancillary equitable restoratives may serve in many cases to neutralize whatever advantage may be gained from delay." Petitioners' theory would make possible exploitation of the processes of judicial review for the purpose of gaining time and when that end has been achieved, repudiation of the "equitable restoratives" that serve as its price—injunction bond and restitution. The court below saw this. It said (Pet. A 42a):

> "To require the reparation remedy would result in depriving the shippers of just those protections in the ratemaking process which the Supreme Court found so important in the *T.I.M.E.* case. Here the shippers have successfully challenged the carriers' rates in the administrative proceeding. In the course of that proceeding, they had to pay the higher rates which were ultimately ordered canceled for over 18 months. The carriers failed to comply with the Commission's order. To hold that the shippers have no remedy for this failure of compliance, except to litigate the whole issue all over again, would make a mockery of the statutory process for challenging carrier-made rates."

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* L. L. Jaffe—Judicial Control of Administrative Action, p. 694.

Section 216(g) of the Act places the burden of proof on the carrier to show that the proposed changed rate is just and reasonable. Failure to discharge that burden results, as in this case, in a Commission order to cancel the unjustified rate. Section 216(g) thus stands as the statutory bulwark between the carrier's reach and the shipper's purse. But, this can be true only if restitution is permitted to function as the equitable restorative of damages sustained by wrongful restraint of the Commission's order. Under petitioners' theory, restitution would vanish from the regulatory scene.

In an opinion notable for its analysis of the facts and for its exploration of the law of restitution, the Court of Appeals reached the conclusion that the remedy of restitution is appropriate to the facts and dictated by the law in this case. The petition states no ground or reason to warrant review by this Court on certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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